Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WALTER E. KOZACHUK, M.D.,

Petitioner,

v.

MEDPOINTE HEALTHCARE, INC.
(Doing Business as Wallace Pharmaceuticals, Inc.)

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should reasonable (or at least *some*) indicia of informed consent, by *voir dire* or otherwise, be a necessary and required element of an oral settlement of a case in open Court, on the record?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Defendant-Appellant and Petitioner: Walter E. Kozachuk, M.D.

Plaintiff-Appellee and Respondent: Medpointe Healthcare, Inc., (Doing Business as Wallace Pharmaceuticals, Inc.)

RULE 29.6 DISCLOSURE

This Petition is filed by an individual and not a body corporate; therefore, no Rule 29.6 disclosure is necessary.

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TABLE OF AUTHORITIES

CASES:

Mitchell v. Robinson, 334 S.W. 2d 11 (mo. 1960) .....
Nathanson v. Kline, 350 p. 2d 1093 (Kan. 1960) ....

TREATISES:

Dangerous Omissions: A Teaching Hospital's Policy Responsibility to its Patients. Janincemarie K. Vinicky (PhD Dissertation, 1992). (Citing the following authorities):

Bibliography

Appelbaum PS, Lidz CW and Meisel A. Informed Consent: Legal Theory and Clinical Practice. New York: Oxford University Press, (1987).

McDonald RA and B Victor. Towards the integration of Individual and Moral Agencies. Business and Professional Ethics Journal. 7 (3&4): 103-118, 1988.

Goodpaster KE and JB Mathews. Can a Corporation have a conscious? Harvard Business Review (Jan-Feb) 145-154, 1982.

The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. Belmont Report: Ethical Principles and Guidelines for the Protection

of Human Subjects of Research. In OPRR Reports, NIH, PHS, HHS, April 18, 1979.

OPINIONS, ORDERS BELOW
Rule 14(i)(i)

Opinions and Orders Below:
Federal Circuit Opinion, April 6, 2010 .....1a - 9a
District Court Order, June 29, 2009 .....10a -11a
District Court Memorandum Opinion,
June 10, 2009 .....12a - 16a

Other Relevant Rulings: Rule 14(i)(ii)
Magistrate Judge Report &
Recommendations, March 3, 2009 .....17a - 28a

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §2101(c). The District Court for New Jersey had jurisdiction pursuant to 35 U.S.C. §256 and §1338(a) because the inventorship of United States patents was before the court for determination.

REASONS FOR GRANTING CERTIORARI

The Federal District Court for New Jersey, then the Court of Appeals for the Federal Circuit, upheld an alleged in-court settlement wherein no *voir dire* was conducted on Defendant by the trial court or his attorney. In upholding such a settlement, these courts departed drastically from the accepted and usual course for judicial proceedings so as to call for an exercise of this Court's supervisory power.

Rule 10(a).

STATEMENT OF THE CASE

Original District Court Jurisdiction:

This action is claimed by Respondent to be based on an alleged "correction of inventorship" of three United States patents under 35 U.S.C. § 256 and § 1338(a).

STATEMENT OF FACTS

Defendant retained Attorney Posillico for the purpose of representing him at trial in the above captioned case. On 3-3-07, Attorney Posillico informs the client his opinion of the merits of the case regarding abandonment and inventorship of the patents in suit. His opinion is similar to the defendant's when he states that, "What good is abandonment testimony if there is no testimony as to inventorship? I have to admit that this case seems like it is one that should not go to trial if that is the case. I don't see how our adversary could possibly carry their burden in this case if they have no one to testify about inventorship." The Defendant in this case was well aware that the alleged co-inventor proposed by the Plaintiffs had been found guilty of patent fraud by the Patent Office.

On 5/07, Defendant and Chris Kidd traveled to Philadelphia to meet with Attorney Posillico to discuss defense strategy. At this meeting, Attorney Posillico agreed to defend the case which included discovery, a deposition of the alleged co-inventor Dr. Sofia, and filing a counterclaim.

During the following year, Attorney Posillico failed to communicate with the Dependent and failed to inform him that a trial date had been set by the Court for late May,

2008. Attorney Posillico only contacted the Defendant while he was in Poland several weeks before an alleged trial hearing. Defendant was informed of the date of the alleged hearing not by Attorney Posillico, but by his former counsel John E. Harris, Esq.

At the time of notification of a pre-trial hearing, Attorney Posillico never informed the client that virtually no legal work was performed in this case. Attorney Posillico communicated a proposed settlement that included proposals for generous compensation and royalties. This implied to the Defendant that legal work had actually been performed on behalf of the Defendant.

Attorney Posillico then acutely reverses his opinion and informs the Defendant that he feels the case is lost and threatens to withdraw his representation as a mechanism of forcing Defendant to agree to terms to which he is adamantly opposed. Defendant is aware that any suggestion that the case is weak is absurd since Plaintiff has no co-inventor witness and no credible evidence that any of the patents discovered were written using knowledge obtained during his employment. **[Email dated: Friday, April 25, 2008 8:53 AM].**

Defendant appeared before Judge Bongiovanni [5-14-08] on the advice of Attorney Posillico who advised that a failed pre-trial agreement was required before a trial could go forward. During this procedure, Defendant only met with Judge Bongiovanni once and agreed that he would provide a good faith effort to settle the case. Defendant never had any direct negotiation with Attorney Brown.

Chris Kidd, a Venture Capitalist who attended the meetings and had access to the same information as

Defendant, came to the same conclusion as the Defendant and was also adamant in not settling but taking the case to trial. [email **5-6-08; 8:36 pm**]]

Defendant maintains only that he agreed to negotiate the foreign rights to the patents (these were not in suit) and did not agree to any of the positions of Attorney Brown.

Later in 2007, Defendant wrote Attorney Posillico a "*Forced Pro Se*" letter regarding his lack of representation after obtaining a Pacer Number to determine what legal services were performed. Review of the docket indicates that Attorney Posillico failed in his fiduciary duty to even make a token effort to represent the Defendant.

In this case, a very significant conflict of the loyalty of an attorney to his client occurred and was expressed approximately two weeks prior to trial: the client paid for and demanded a trial while the Attorney dramatically changed course (based on weak and non-credible legal reasoning) in the absence of any changes in the circumstances of the case (other than the Attorney failing to perform his contractual legal defense that he was paid to perform). The Attorney then demanded and attempted to intimidate the Defendant into settling the case without trial.

The Magistrate Judge commenced an all-day settlement pre-trial conference to explore settlement possibilities on May 14, 2008. During this settlement, Defendant was sequestered and never had any direct negotiation with Attorney Brown or the Judge. Defendant received only information that was prudent and useful to his attorney and was reliant on the disinformation of his

Attorney. (An example of being misled is that the oral agreement states that Defendant agrees to give away valuable intellectual property *that was not part of the legal proceedings* while Defendant was informed that this was requested by Plaintiff but denied by Judge Bongiovanni).

When Defendant was informed of the financial settlement proposal ($15,000 per patent) by Plaintiff, he demanded an end to the negotiations but was told that a pre-trial agreement was pre-requisite to going to trial. Such a paltry sum is absurd on its face since the contract under which Defendant was sued states that the minimum he receives is the cost of patent development (assuming the Plaintiff has evidence that the Patents were derived from knowledge during his employment). Review of the oral agreement includes the absurd concession that Defendant give away more intellectual property than was involved under suit; agreeing to extend an expired employment contract; and agreeing that any future intellectual property that Defendant discovers be automatically subject to arbitration by Plaintiff.

Ultimately the Defendant was led into the Courtroom where is claimed to have settled the case pursuant to the following colloquy:

> Mr. Poscillico (Kozachuk's attorney):...There may be certain claims that MedPointe believes are subject to the agreement, and other claims that are not. So the arbitration may be some – some sub portion of the patent application. With that understanding otherwise, I'm in full agreement.
>
> The Court (Medpointe's attorney): Mr. Brown?

Mr. Brown: Yeah. Yeah. We agree that it – you know obviously pending review of it, it could relate to only some of the plans. We agree with that.

The Court: Ok, Dr. Kozachuk, do you agree as well?

Dr. Kozachuk: Yes

The Court: Ok, and I just wanted to specifically note that is the only US Patent that involves Felamate?

Dr. Kozachuk: It is.

App. at 35-a

Defendant was previously assured that any statements made by Plaintiff's Attorney were required to place the position of the Plaintiff on the record in case no resolution was made prior to trial. It is important to note what is not said in this colloquy. Defendant's Attorney never states that "My client agrees to the conditions of the preceding settlement offer". Rather, Defendant's Attorney only agrees that any intellectual property that is not under suit (foreign patents) would be subject to arbitration. That the Defendant agrees to this stipulation is hardly surprising since Defendant previously proposed arbitration of the patents in suit that was rejected by Plaintiff.

NO VOIR DIRE on ANY kind was conducted by anyone at the conclusion of these proceedings. That Defendant's Attorney did not attempt to perform a voir dire is hardly surprising since the Defendant would have realized he had waived his right to a trial. When his

Attorney later attempted to press for Petitioner to execute formal settlement documents (which were drafted without the consent or knowledge of the Defendant), he was astounded to hear that the case had been concluded by the foregoing vague dialogue and adamantly refused to consummate settlement.

When a Motion to Enforce Settlement Agreement was next prosecuted, the conflict of interest and loyalty owed to Defendant by his Attorney was made apparent to the Magistrate Judge (and is therefore of record), who rejected such and ordered Petitioner to settle the case. Petitioner continued to refuse.

ARGUMENT

There should be Reasonable, or at Least *Some* Indicia of Informed Consent, by *Voir Dire* or Otherwise, Required for In-Court, Oral Settlement of Cases on The Record.

THE ETHICS OF INFORMED CONSENT

Appelbaum, Lidz and Meisel, in their book entitled, Informed Consent (1987) describe informed consent: Informed consent refers to the legal rules that prescribe behaviors for professionals in their interactions with clients and provide for penalties under given circumstances, if professionals deviate from those expectations; to an ethical doctrine, rooted in our society's cherished value of autonomy, that insures to clients/patients their right to self-determination when decisions need to be made; and to an interpersonal process whereby professionals interact with clients/patients to select an appropriate course of

action" (Appelbaum, Lidz and Meisel, 3).

Legal cases promulgated in the 1950's and 1960 have provided the precedent for consent and disclosure requirements. The decisions in Natanson v. Kline (1960) and Mitchell v. Robinson (1960) set the tone for future of the course of the legal doctrine of informed consent in the U.S. jurisprudence. Moral agency involves first, a decision as to 'what ought to be done' in a given situation (the deontic judgment) followed by a translation of that action into behavior (McDonald & Victor, 103).

A major concept of the philosophic notion of moral responsibility refers to an agent's trustworthiness and reliability in moral decision-making (Goodpaster and Mathews). They write that, "individuals are responsible if ... they allow appropriate factors to affect their judgment; we refer primarily to person's independent thought processes and decision making, processes that justify an attitude of trust from those who interact with him or her as a responsible individual...Here the focus is on the individual's moral reasoning...and contrast it with such other processes as being financial prudent and attending to legal obligations" (Goodpaster and Mathews, 146, 147).

In the current case, Defendant relied on his agent's dubious trustworthiness and reliability in moral decision making and was therefore unable to make an independent thought process in his decision making. The alleged decision made by the Defendant was made on moral reasoning based on disinformation provided to him thus he was not able to make a financially prudent decision.

Informed consent, at least as it is perceived in the United States, is a process in which communication

between a profession and client occurs that generally results in the client becoming informed about a potential decision recommended by the professional. This process is generally unsupervised and unquestioned, especially if the result is the client's agreement to the case.

The Defendant has noted that his Attorney failed to communicate with him after the initial meeting (a fact corroborated by his partner Chris Kidd). Not only does this violate the ethical process that allows for an individual to make an informed decision, it violates the ethical conduct of an Attorney to his client under New Jersey State Law (RPC 1.4 Communication).

The ethics of informed consent is grounded in several principles governing the rights of clients/patients. The most important principle as articulated in The Belmont Report (1979) and in most textbooks on [medical] ethics written during the past thirty is the principle of respect for persons based primarily on the prima facia right of every individual to self-determination or autonomy.

In the current case, the Defendant was deprived of his right to self-determination and autonomy by deliberate disinformation and deception by his Attorney. This violates the most basic right of the ethics of informed consent.

Beauchamp and Childress, in the Third (3rd) Edition of Principles of Biomedical Ethics, define the notion of informed consent as an autonomous authorization. However, several elements of informed consent must be met for such consent to be considered ethically valid. First, before even considering whether a patient has adequate information to make a voluntary choice, one must assess whether the patient has the competence for choice. *In this*

case we assume that a medical doctor and neuroscientist who has spent a decade involved in neuroscientific patent discovery, the legal process of patent development and venture capital and the process of economics of venture capital has competence to make an informed choice.

Once a determination is made that a patient is competent for choice does not necessarily mean that the patient is free of external coercion or other factors required for valid informed consent, namely the informational elements (1) disclosure of information, (2) understanding of information; and the consent elements, (1) voluntariness and (2) authorization.

For consent to be ethically valid, the professional must have disclosed to the client the information relevant to the decision making regarding the process and procedure in question. Without adequate information, a client's autonomy cannot be respected.

In the current case, it is a matter of record that the Attorney failed to disclose any information to his client (including the date of a scheduled trial several months prior to his initial contact with his client) and also misinformed his client about the nature and facts of the proceedings which thus negate the informational elements of informed consent.

Professionals are, in most cases obligated to disclose "(1) those facts or descriptions that clients or subjects consider material in deciding whether to refuse or consent to the proposed intervention or research, (2) information the professional believes to be material, (3) the professional's recommendation, and (4) the purpose of seeking consent and the nature of consent as an act of

authorization (Beauchamp and Childress, 86-87).

In the current case, it is a matter of record that the Attorney provided facts that were directly opposed to his prior assessment of the case as well s the reality of the legal fasts of the case; credible evidence of what was material to the case; professional recommendations that were valid; and the purpose of seeking the Defendant's consent and authorization. Thus the information provided to the Defendant prior to the pre-trial conference fails on all of the above accounts and prevents the Defendant from consenting to an act of authorization. These violations invalidate the alleged agreement of the client in open court and nullify an alleged act of authorization.

Disclosure should occur in a manner that is readily understandable by the patient/client and should be presented in such a manner as to facilitate the patient's decision making capacity. "In many informed consent cases, the inadequacy of a person's understanding about a single risk or limitation is the reason why the person did not understand what he or she was consenting to. A single missing fact can thus deprive a person of adequate understanding" (Beauchamp and Childress, 100).

In the current case, not only was honest disclosure not provided in an understandable manner but Defendant's attorney indulged in misinformation and deception in order to trick his client into agreeing to an alleged absurd settlement. This impaired the decision making capacity of Defendant. The Defendant was provided with multiple missing facts and deliberate disinformation.

The final elements of consent from an ethical standpoint are the consent elements of voluntariness and

authorization. Simply defined, voluntariness means that a person is acting or deciding in the presence of adequate knowledge, in the absence of psychological compulsion, and in the absence of external constraints (Beauchamp and Childress, 106).

In the current case, the record is clear that voluntariness was denied the Defendant by his Attorney by inadequate knowledge while the absence of psychological compulsion and absence of external constraints was also denied by the threats and pressure of his Attorney who threatened withdrawal from the case if the Defendant did not agree to terms he felt were despicable. In addition, rather than informing the Defendant that he breached his duty and had a legal right to replacement counsel, this Attorney continued to enforce an agreement by violating the principle of confidentiality of privileged communication between attorney and client. A recent example is that Plaintiff's counsel accuses Defendant of using "shadow counsel" and names attorney James Crawford Sr. after Attorney Posillico struck his appearance. This accusation fails since James Crawford Sr. deceased on 12-2-08 [prior to Attorney Posillico striking his appearance]. However, since Attorney Crawford did speak to Attorney Posillico prior to his death, this information could only have been provided by former counsel Joe Posillico. This is a violation of professional ethics and attorney-client privilege.

Beauchamp and Childress further state that "a person acts voluntarily to the degree he or she wills the action without being under the control of another agent's influence" (Beauchamp and Childress, 106-107).

In the current case, this is the most egregious act of former Attorney Posillico since any dubious alleged

agreement in open court was a direct result of the Defendant being under the control of another's agent's influence both against his will and better judgment. This devious manipulation prevented the Defendant form acting voluntarily and thus negates any rationale informed consent that the prior Court rulings allege.

Authorization is often the conclusion of a lengthy process of dialogue between the professional and the client. Authorization is not merely the patient's signature on a consent document, but the conclusion of a process of assessing the patient's competence for choice, disclosing adequate and appropriate information to such clients/patients, receiving feedback from the client/patient, an assessment of the patient's understanding of the meaning of an authorization if one is to be given, an assessment of the freedom of the patient to choose, and the culmination of a process of shared decision making resulting in the patient's acceptance or rejection of the professional's recommendation.

In the current case, Authorization of the alleged agreement in open court can only be deemed null and void since there is insufficient information for competent choice; adequate and appropriate information was not disclosed; and an assessment of the Defendant's understanding and freedom to choose was denied by the lack of voir dire; and thus the culmination of the process was inadequate to make an informed decision to accept or reject the alleged agreement in open court.

In the conclusion of The President's Commission Report: Making Health Care Decisions, it states: "Current requirements for informed consent owe much to the legal system, but the values underlying these requirements are

not merely legal artifacts. Rather, they are deeply embedded in American culture and the American character; they transcend partisan ideologies and the politics of the moment. Fundamentally, informed consent is based on respect for the individual, and, in particular, for each individual's capacity and right both to define his or her own goals and to make choices designed to achieve these goals" (Making Health Care Decisions, Vol. 1, 17).

In the current case, the Defendant was denied the right to make an informed decision regarding consent based on the lack of respect as individual and thus his capacity and right to define his own goals and choices were denied

In summary, the requirements for valid informed consent included an assessment of the competence of the patient for choice (the threshold element), disclosure by the professional of the essential elements of informed consent (nature of the problem, options, risks, benefits, alternatives to the recommended solutions if they exist, as well as risks and benefits of alternatives). Valid informed consent also requires that the patient comprehend the proposed solution and the person be as free from coercive elements as possible; that is, that the patient who is self-determining has the primary right to decide to accept or refuse the therapy/research. And finally valid informed consent requires the authorization of the subject.

In the current case, the actions of Attorney Posillico violated and failed to satisfy all of the elements of proper informed consent. The Defendant has provided ample evidence that his right to make an informed was denied all of the principles of informed consent.

CONCLUSION

For the foregoing reasons and lack of informed consent, the alleged "settlement agreement" in this case should be rejected and the case remanded to trial.

Respectfully submitted,

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